

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs February 5, 2002

STATE OF TENNESSEE v. ANTOINE JACQUES WILLIAMSON

**Direct Appeal from the Circuit Court for Tipton County
No. 4078 Joseph H. Walker, Judge**

No. W2001-01400-CCA-R3-CD - Filed March 18, 2002

The Appellant, Antoine Jacques Williamson, pled guilty to one count of theft of property over \$1,000, a class D felony, and received, pursuant to a negotiated plea agreement, a sentence of two years as a range I offender. Williamson's entitlement to judicial diversion was reserved for determination by the trial court. Following a hearing, the court imposed a sentence of split confinement which required Williamson to serve 30 days in the Tipton County jail and the balance on supervised probation. On appeal, Williamson argues that the trial court erred in denying judicial diversion. After review, we find that the trial court failed to consider all the relevant factors. Accordingly, we reverse the judgment of the trial court denying diversion and remand the case for deferment of further proceedings as provided by Tennessee Code Annotated § 40-35-313 (2001).

Tenn. R. App. P. 3; Judgment of the Circuit Court is Reversed and Remanded.

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER JJ., joined.

Gary F. Antrican, District Public Defender, Somerville, Tennessee, for the Appellant, Antoine Jacques Williamson.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; P. Robin Dixon, Jr., Assistant Attorney General; Elizabeth T. Rice, District Attorney General; and Kim Linville, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

In March of 2000, the Appellant was employed as the assistant manager of the "On-Cue" store in Covington, which engaged in the sale of CDs, DVDs, video tapes and cassettes. At the

sentencing hearing, the Appellant explained how he unlawfully obtained possession over the property for which he was indicted.

A. Well, first, like we were told to throw away all damaged merchandise and to [delete] out the computer, and I was doing that. And we changed managers and the new manager told me to not worry about [deleting] out the computer - - I just mentioned it to him and he would take care of it. So that's what I started doing after that. And I was just throwing away the damaged merchandise and after a while I just started going back and retrieving it out of the dumpster just to see how damaged it, you know - open the cases up.

Q. Okay. And you would take the things that was out of the dumpster?

A. Yes.

Q. And you'd keep them - - the ones that were worth keeping, you'd keep some of them and you sold some of them; is that correct?

A. Yes, sir.

Q. I think you told me that everything that you threw away was, you thought, damaged?

A. It was not saleable.

Q. Okay. But you didn't have permission to come back and get the stuff?

A. No, sir.

Q. And you didn't have permission, certainly, to sell it?

A. No.

The Appellant further explained that he was furnished a "chart" which identified the merchandise considered to be damaged, and it was his responsibility to remove those items from the store and place them in the dumpster. Based upon this conduct, the Appellant was charged in a single count indictment with theft of numerous "CDs, DVDs and cassettes," which were the property of On-Cue, and had a value over \$1000 but less than \$10,000, in violation of Tennessee Code Annotated § 39-14-103 (1997), a class D felony. On April 24, 2001, the Appellant, pursuant to a negotiated plea agreement, entered a guilty plea, which provided for a sentence of two years and restitution in the amount of \$2,500. The manner of service of the sentence, including the availability of judicial diversion, was submitted to the trial court for determination. Following a sentencing hearing, the

trial court denied the Appellant's request for judicial diversion. The Appellant now appeals from this judgment contending as error the denial of judicial diversion.

ANALYSIS

“Judicial diversion is a legislative largess whereby a defendant adjudicated guilty may, upon successful completion of a diversion program, receive an expungement from all 'official records' any recordation relating to 'arrest, indictment or information, trial, finding of guilty, and dismissal and discharge' pursuant to the diversion statute.” *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999). The effect of discharge and dismissal under the diversion statute “is to restore the person . . . to the status the person occupied before such arrest or indictment or information.” *Id.* (citing Tenn. Code Ann. § 40-35-313(b) (1997)).

A criminal defendant is eligible for judicial diversion only if he has been convicted of a misdemeanor or a class C, D, or E felony and he must not have been previously convicted of a felony or a Class A misdemeanor. *See* Tenn. Code Ann. § 40-35-313(a)(1)(A) (2001). However, eligibility under the diversion statute does not ensure the grant of diversion. Indeed, the decision of whether to place an appellant on judicial diversion is within the sound discretion of the trial court. *See State v. Harris*, 953 S.W.2d 701, 705 (Tenn. Crim. App. 1996). Thus, upon review by an appellate court, if “any substantial evidence [exists in the record] to support the refusal,” the decision of the trial court will be upheld and this court will not revisit the issue. *See State v. Hammersley*, 650 S.W.2d 352, 356 (Tenn. 1983).

In making the determination of whether to grant judicial diversion, the trial court must consider the following factors: (a) the accused's amenability to correction; (b) the circumstances of the offense; (c) the accused's criminal record; (d) the accused's social history; (e) the status of the accused's physical and mental health; and (f) the deterrence value to the accused as well as others. *State v. Lewis*, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997), *perm. to appeal denied* (Tenn. 1998) (citing *State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993)). The trial court should also consider whether judicial diversion will serve the ends of justice – the interests of the public as well as the accused. *Id.* Additional factors which may be considered include the Appellant's attitude, his behavior since his arrest, his home environment, current drug usage, emotional stability, past employment, general reputation, family responsibilities, and the attitude of law enforcement. *Id.* (citing *State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993)).

The finding of the trial court was simply stated; “[c]onsidering principles of sentencing, [the court’s] find[s] under T.C.A. 40-35-303, it’s not a proper case to grant judicial diversion.” In view of this summary denial of diversion, we are without the trial court’s rationale for its ruling in our review on appeal. *See Bonestel*, 871 S.W.2d at 168. Notwithstanding this omission, the question remains whether the trial court reached the correct result. *See, e.g., State v. Johnson*, No. 02C01-9612-CR-00476 (Tenn. Crim. App. at Jackson, Feb. 12, 1998), *perm. to appeal denied* (Tenn. 1998); *State v. Wilbanks*, No. 02C01-9601-CR-00003 (Tenn. Crim. App. at Jackson, Nov. 19, 1996). Accordingly, we must make a *de novo* determination if there is any substantial evidence to support

this denial of judicial diversion. *See* Tenn. Code Ann. § 40-35-401(d) (1997); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

The record in the present case reveals that the Appellant is eligible for judicial diversion because he was convicted of a class D felony and has not been previously convicted of a felony or a Class A misdemeanor. Indeed, the presentence report indicates no prior arrest of any type. The Appellant attended Tennessee Technology Center after graduating from high school. At the time of this offense, the Appellant was twenty-one years old and had been an employee of On-Cue for approximately sixteen months. His employment history prior to On-Cue is certainly less than admirable as the record indicates he either quit or was terminated from five different positions of employment. The Appellant is currently employed and contributes to the support of his fiancée and child. The presentence report reflects that the Appellant does not abuse either alcohol or illegal drugs. Moreover, the record demonstrates that the Appellant is amenable to correction. Accordingly, we conclude that the Appellant's positive factors for diversion as articulated above outweigh any negative factors, and that granting judicial diversion would promote the ends of justice. The sentencing decision of the trial court is reversed and entry of the judgment of conviction is vacated.

CONCLUSION

Based upon this record and the trial court's failure to consider all relevant factors, we find that the trial court abused its discretion by denying judicial diversion. For this reason, the trial court's judgment is reversed, and the case is remanded for deferment of further proceedings as provided by Tennessee Code Annotated § 40-35-313 (2001), and for the imposition of such other reasonable conditions as may be deemed appropriate by the trial court.

DAVID G. HAYES, JUDGE